

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
THOMAS LAYDEN AND MARIE O'DONNELL	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1985 through 1987.	:	DETERMINATION

In the Matter of the Petitions	:	DTA NOS. 809938,
of	:	809939, 809940
THOMAS LAYDEN AND MARIE O'DONNELL	:	AND 809941
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period March 1, 1987	:	
through August 31, 1989.	:	

Petitioner Thomas Layden, P.O. Box 325, Sterling Road, Greenwood Lake, New York 10925, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1985 through 1987.

Petitioner Marie O'Donnell, P.O. Box 325, Lakeshore Road, Greenwood Lake, New York 10925, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1985 through 1987.

Petitioner Thomas Layden, P.O. Box 325, Sterling Road, Greenwood Lake, New York 10925, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1987 through August 31, 1989.

Petitioner Marie O'Donnell, P.O. Box 325, Lakeshore Road, Greenwood Lake, New York 10925, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1987 through August 31, 1989.

On May 5, 1993 and May 12, 1993, respectively, petitioners, appearing by Jay S.

Goodman, Esq. and the Division of Taxation appearing by William S. Collins, Esq. (Donald C. DeWitt, Esq., of counsel) consented to have the controversies determined on submission without a hearing. On June 8, 1993, the Division of Taxation submitted documentary evidence. On June 30, 1993, petitioners filed a memorandum of law in support of their position. On July 13, 1993, the Division of Taxation filed a brief in support of its position. Petitioners were granted until September 6, 1993 to file a reply to the Division of Taxation's brief, but did not do so. After due consideration of the record, Timothy J. Alston, Administrative Law Judge, issues the following determination.

ISSUES

- I. Whether the three-year period of limitations set forth in Tax Law § 683(a) is applicable to penalty assessments issued pursuant to Tax Law § 685(g), thereby nullifying a portion of the penalties assessed against petitioners herein.
- II. Whether petitioners, who were assessed as persons responsible to collect tax under Tax Law § 1133(a), were properly subject to assessments of penalties and interest pursuant to Tax Law § 1145(a)(1)(i).

FINDINGS OF FACT

Withholding Tax Matter

On June 29, 1990, the Division of Taxation ("Division") issued notices of deficiency to each of the petitioners, Thomas Layden and Marie O'Donnell. The notices asserted \$32,880.72 in penalty due under Article 22 of the Tax Law for the years 1985, 1986 and 1987.

Pursuant to a Statement of Deficiency also issued to the respective petitioners on June 29, 1990, the Division advised that the assertion of penalty against each petitioner was pursuant to Tax Law § 685(g). The Division further advised that it had determined that petitioners were persons responsible to collect and remit withholding tax on behalf of Dane & Murphy, Inc. and that, therefore, petitioners were liable for penalty equal to the amount of withholding tax not remitted by such corporate entity. The Statement of Deficiency further listed the specific withholding tax periods and the penalty amounts as follows:

<u>WITHHOLDING TAX PERIOD</u>	<u>AMOUNT</u>
10/16/85 - 10/31/85	\$ 7,624.76
03/16/87 - 03/31/87	1,679.96
01/16/87 - 01/31/87	1,066.11
01/01/87 - 01/15/87	330.08
04/01/87 - 04/15/87	1,155.02
05/01/87 - 05/15/87	1,113.34
04/16/87 - 04/30/87	1,189.56
05/16/87 - 05/31/87	905.07
06/01/87 - 06/15/87	1,076.51
06/16/87 - 06/30/87	451.31
07/01/86 - 12/31/86	15,671.79
07/16/87 - 07/31/87	295.51
07/01/87 - 07/15/87	321.70
	<u>\$32,880.72</u>

Petitioners Thomas Layden and Marie O'Donnell were president and vice-president, respectively, of Dane & Murphy, Inc. during the period at issue herein. Petitioners concede that each was a person required to insure that Dane & Murphy, Inc. remitted the withholding taxes that it deducted or withheld or was required to deduct or withhold from the wages of its employees in accordance with sections 675, 685(g) and 685(n) of the Tax Law.

The assessment herein results from withholding taxes which were withheld or required to be withheld from the wages of Dane & Murphy, Inc.'s employees and which were reported as withheld on withholding tax returns, but which were not paid over to the Division.

There is no dispute that the notices of deficiency herein were issued more than three years from the dates of filing of the withholding tax returns of Dane & Murphy, Inc. pertaining to the periods October 16 through October 31, 1985 and July 1 through December 31, 1986.

There is also no dispute herein that Dane & Murphy, Inc. did in fact fail to pay over to the Division withholding taxes in the amounts set forth in the statements and notices of deficiency.

Sales Tax Matter

On June 22, 1990 and July 13, 1990, the Division issued to petitioners Thomas Layden and Marie O'Donnell, respectively, notices of determination and demands for payment of sales and use taxes due which assessed against each petitioner an aggregate amount of \$16,816.14 in tax due, plus penalty and interest for the period March 1, 1987 through August 31, 1989.

The notices of determination indicated that petitioners were being assessed as officers of Dane & Murphy, Inc. pursuant to sections 1131(1) and 1133 of the Tax Law.

Except for the quarterly period March 1 through May 31, 1988, the notices of determination were premised on the filed sales tax returns of Dane & Murphy, Inc., which were filed without payment of tax. The assessment of \$7,745.82 for the period March 1 through May 31, 1988 was estimated.

Pursuant to conciliation orders dated June 14, 1991, the assessments against each petitioner were reduced to \$9,651.42, plus penalty and interest. This reduction resulted from the filing of Dane & Murphy, Inc.'s sales tax return for the period March 1 through May 31, 1988 which indicated \$581.10 in tax due for that quarter. In accordance with the return, the conciliation orders reduced the assessments for this quarter from \$7,745.82 to \$581.10.

During the relevant period, petitioner Thomas Layden was president of Dane & Murphy, Inc. and petitioner Marie O'Donnell was vice-president.

Petitioners concede that they were persons required to collect sales and use tax on behalf of Dane & Murphy, Inc. under section 1131(1) of the Tax Law and that they were personally liable for the payment of such tax pursuant to section 1133(a) of the Tax Law.

CONCLUSIONS OF LAW

Withholding Tax Matter

A. Petitioners contend that the three-year period of limitations contained in section 683(a) of the Tax Law is properly applicable to penalties imposed under section 685(g). Petitioners contend that the portion of the assessment related to the years 1985 and 1986 was therefore time-barred and was improperly assessed. Petitioners' argument runs as follows: Tax Law § 683(a) imposes a three-year limitations period for the assessment of any tax under Article 22. Tax Law § 685(l) states that any reference to tax in Article 22 shall refer to penalties imposed under section 685. Penalty assessments against corporate officers, such as the assessments against petitioners herein, are made under Tax Law § 685(g). It follows, therefore, that the three-year statute applies to penalty assessments made under section 685(g).

Petitioners further argue that a close reading of Matter of Wolfstich v. New York State Tax Commn. (106 AD2d 745, 483 NYS2d 779), upon which the Division relies herein, will reveal that the court in Wolfstich did not address the fundamental issue involving the applicability of the three-year period of limitations to assessments under Tax Law § 685(g).

B. Petitioners' contentions are rejected. In Matter of Wolfstich v. State Tax Commn. (supra) the court stated the question before it as follows:

"[D]oes the three-year Statute of Limitations for the assessment of taxes under section 683 of the Tax Law bar the imposition of a penalty pursuant to section 685(subd.[g]) of the Tax Law?" (Matter of Wolfstich v. State Tax Commn., supra, 483 NYS2d at 781.)

The court answered this question in the negative and found that the three-year statute did not so apply. The court reasoned that the penalty under section 685(g) was "wholly distinct from any assessment under section 683" and that "[a]s a separate statutory liability, it need not be assessed within any particular period after the corporate assessment is made (citations omitted)" (id.). The instant matter presents the same question as was before the court in Wolfstich and therefore compels the same result. Specifically, that the three-year statute does not apply to assessments made under section 685(g) and that, therefore, no portion of the assessments herein were time-barred.

C. It is further noted that the Tax Appeals Tribunal, when faced with the same issue in Matter of Friedman (Tax Appeals Tribunal, July 8, 1988), found Wolfstich to be dispositive and held that the three-year statute did not apply to assessments made under section 685(g).

Sales Tax Matter

D. Petitioners concede their liability for the sales tax assessed herein, but contest the imposition of penalties and interest. Petitioners contend that their liability under Tax Law §§ 1131 and 1133 is limited to the tax and does not extend to the penalties and interest. Petitioners therefore seek abatement of such penalties and interest.

E. Petitioners' contention is rejected. As petitioners have conceded, each was a "person required to collect tax" on behalf of Dane & Murphy, Inc. pursuant to Tax Law § 1131(1). Under Tax Law § 1133(a), such "persons" are personally liable for "the tax imposed, collected

or required to be collected under [Article 28]." Tax Law § 1145(a)(1)(i), pursuant to which penalties and interest were imposed herein, provided for the imposition of penalties and interest on "any person failing to timely file a return or to pay or pay over any tax within the time required" (emphasis supplied). Accordingly, as persons required to collect tax, petitioners were properly liable for penalties and interest as persons who failed to timely file returns or pay tax (see, Hall v. Tax Appeals Tribunal, 176 AD2d 1006, 574 NYS2d 862; Matter of Harding Caterers, Tax Appeals Tribunal, January 9, 1992).

F. The petitions of Thomas Layden and Marie O'Donnell are denied; the notices of deficiency, dated June 29, 1990, are sustained; and the notices of determination and demands for payment of sales and use taxes due, dated June 22, 1990 and July 13, 1990, as modified by conciliation orders dated June 14, 1991 (see, Finding of Fact "10"), are sustained.

DATED: Troy, New York
February 10, 1994

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE